

## **DISADVANTAGED BUSINESS ENTERPRISE (DBE) CONTRACT PROVISIONS**

**1.0 Disadvantaged Business Enterprise (DBE) Program Requirements.** The subsequent Sections will apply only to this contract since it involves U.S. Department of Transportation (USDOT) federal-aid or federal financial participation. Federal-aid or federal financial participation includes, but is not limited to, any funds directly or indirectly received by the Local Public Agency, or authorized for distribution through MoDOT, by the USDOT or any operating administration within the USDOT. Any contractor, subcontractor, supplier, DBE firm, and contract surety involved in the performance of this federal-aid contract shall be aware of and fully understand the terms and conditions of the USDOT DBE Program, as the terms appear in Title 49 Code of Federal Regulations (CFR) Part 26 (as amended), the USDOT DBE Program regulations; Title 7 Code of State Regulations (CSR) Division 10, Chapter 8 (as amended), MoDOT's DBE Program rules.

**2.0 DBE Program Information.** DBE Program information may be obtained from the MoDOT External Civil Rights Administrator, 105 W. Capitol Avenue, P.O. Box 270, Jefferson City, Missouri 65102-0270. Phone (573) 751-6801, Fax (573) 526-0558, E-Mail: [dbes@modot.mo.gov](mailto:dbes@modot.mo.gov). It will be the duty of each contractor, for the contractor and for the contractor's subrecipients and surety, to take the steps necessary to determine the legal obligations and limitations under the DBE Program, as an element of responsibility. It will be the duty of each certified DBE firm to know, understand and comply with the DBE firm's legal obligations and limitations under the DBE Program, as a requirement of program participation. A surety providing a bid or contract bond will be bound by those bonds to the duties of the surety's principal.

**3.0 DBE Program Distinguished From Other Affirmative Action Programs.** The USDOT DBE Program established by the U.S. Congress is not the same as, and does not involve or utilize, any of the elements or authority of other state or local affirmative action programs. The USDOT DBE Program is implemented by the Local Public Agency and MoDOT, through and in conjunction with the Federal Highway Administration, Federal Transit Administration and Federal Aviation Administration, as a "recipient" defined in Title 49 CFR 26.5.

**4.0 Policy Regarding DBE Firms.** It is the policy of the U. S. Department of Transportation and MoDOT that businesses owned by socially and economically disadvantaged individuals have an opportunity to participate in the performance of contracts financed in whole or in part with federal funds. Consequently, the requirements of 49 CFR Part 26 (as amended) and MoDOT's implementing state regulations in Title 7 CSR Division 10, Chapter 8, "Disadvantaged Business Enterprise Program", will apply to any contract with federal funds.

**5.0 Opportunity for DBEs to Participate.** Each contractor, subcontractor and supplier working on a contract financed in whole or in part with federal funds shall take all necessary and reasonable steps to ensure that DBEs have an opportunity to compete for, and participate in performance on project contracts and subcontracts.

**6.0 Required Contract Provision.** This federal-aid contract will include the following provision, as mandated by USDOT at Title 49 CFR 26.13(b):

(a) The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of the contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of USDOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of the contract, which may result in the termination of the contract or such other remedy, as the recipient deems appropriate.

In this provision, “contractor” will be defined as the contractor on the contract; “subrecipient” will be defined as any subcontractor performing the work. For the purposes of any federal-aid contract awarded by the Local Public Agency, “the recipient” will be defined as either the Local Public Agency, or MoDOT, or both. The contractor shall include this same contract provision in every supply contract or subcontract the contractor makes or executes with a subrecipient.

**7.0 Bank Services.** The contractor, and each subrecipient on this federal-aid contract, is encouraged to use the services of banks owned and controlled by socially and economically disadvantaged individuals. Such banking services, and the fees charged for services, typically will not be eligible for DBE Program contract goal credit. Any questions on this subject should be directed to the MoDOT External Civil Rights Administrator. See [Section 2.0](#).

**8.0 DBE Certification, and the Missouri Regional Certification Committee (MRCC).** At present, the only DBE firms eligible to perform work on a federal-aid contract for DBE contract goal credit are firms certified by MoDOT. When the MRCC takes effect in Missouri pursuant to 49 CFR 26.81 and 7 CSR 10-8.061, certification of a firm as a DBE by the Missouri UCP members will be equivalent to DBE certification by MoDOT.

**9.0 DBE Program-Related Certifications Made By Bidders and Contractors.** If the bidder makes a written, express disclaimer of one or more certifications or assurances in the “DBE Submittal” forms, that submission will be considered non-responsive. By submitting a bid with DBE information on any project involving USDOT federal financial participation, and by entering into any contract on the basis of that bid, the contractor makes each of the following DBE Program-related certifications and assurances to USDOT, to the Local Public Agency, and to MoDOT:

(a) The bidder certifies that management and bidding officers have reviewed and understand the bidding and project construction and administration obligations of the USDOT DBE Program regulations at Title 49 CFR Part 26 (as amended), the USDOT DBE Program regulations; Title 7 CSR Division 10, Chapter 8 (as amended), and the MoDOT’s DBE Program rules. The bidder further certifies that the contractors management personnel on the project understand and are familiar with the requirements of these federal and state DBE Program regulations; and if the bidder was not familiar

with or did not understand the requirements of these regulations, they have contacted the External Civil Rights Unit of MoDOT and have been informed as to their duties and obligations under the DBE Program regulations.

(b) The bidder certifies that the bidder has complied with the federal and state DBE Program requirements in submitting the “DBE Submittal” forms, and will comply fully with these requirements in performing any federal-aid contract awarded on the basis of that submission.

(c) The bidder agrees to ensure that certified DBE firms have a full and fair opportunity to participate in the performance of this contract. The bidder certifies that all necessary and reasonable steps were taken to ensure that DBE firms have an opportunity to compete for, and perform work on this contract. The bidder further certifies that the bidder has not and will not discriminate on the basis of race, color, age, national origin or sex in the performance of this contract, or in the award of any subcontract.

(d) The bidder certifies, under penalty of perjury and other applicable penal laws that if awarded this federal-aid contract, the contractor will make a good faith effort to utilize certified DBE firms to perform DBE work at or above the amount or percentage of the dollar value specified in the bidding documents. The bidder further certifies the bidder’s understanding that the bidder may not unilaterally terminate, substitute for, or replace any DBE firm that was designated in the executed contract, in whole or in any part, with another DBE, any non-DBE firm or with the contractor's own forces or those of an affiliate of the contractor, without the prior written consent of MoDOT as set out below.

(e) The bidder certifies, under penalty of perjury and other applicable penal laws that a good faith effort was made to obtain DBE participation in this contract, at or above the DBE participation contract goal. The bidder further certifies, under penalty of perjury and other applicable penal laws, that if the bidder is not able to meet the MoDOT’s specified DBE contract goal by the time the proposed DBE participation information must be submitted, within three business days after bid opening, the bidder has submitted with and as a part of the bid, a true, accurate, complete and detailed written explanation of **all** its good faith efforts taken to meet the DBE contract goal.

(f) The bidder understands and agrees that if awarded this contract the contractor is legally responsible to ensure that the contractor and each DBE subcontractor and supplier, comply fully with all regulatory and contractual requirements of the USDOT DBE Program, and that each DBE firm participating in this contract fully performs the designated tasks, with the DBE’s own forces and equipment, under the DBE’s own direct supervision and management. The bidder certifies, under penalty of perjury and other applicable penal laws, that if it awarded this contract and if MoDOT or the Local Public Agency determine that the contractor, a DBE or any other firm retained by the contractor has failed to comply with the DBE Program requirements or federal or state DBE Program regulations, the Local Public Agency, through MoDOT, shall have the sole authority and discretion to determine the extent of the monetary value to which the DBE

contract goals have not been met, and to assess against and withhold monetary damages from the contractor in the full amount of that breach. The Local Public Agency, through MoDOT, may impose any other remedies available at law or provided in the contract in the event of a contract breach. The bidder further understands and agrees that this clause authorizes the Local Public Agency, through MoDOT, to determine and fix the extent of the damages caused by a breach of any contractual or regulatory DBE Program requirement and that the damage assessment will be enforced in addition to, and not in lieu of, any other general liquidated damages clause in this contract. By submitting a bid for this federal-aid contract, and by entering into this contract, the bidder irrevocably agrees to such an assessment of liquidated damages for DBE Program purposes, and authorizes the Local Public Agency and MoDOT to make such an assessment of liquidated damages against the contractor, and to collect that assessment from any sums due the contractor under this contract, or any other contract, or by other legal process. The bidder makes this certification, agreement and authorization on behalf of itself, its subcontractors and suppliers, and the bid bond and contract bond sureties, for this federal-aid contract.

(g) The surety upon any bid or contract bond acknowledges the surety is held and firmly bound to the Local Public Agency for each and every duty of the surety's principal provided in any bid or contract regarding the DBE program.

**10.0 Designation of DBE firms to perform on contract** The bidder states and certifies, under penalty of perjury or other applicable penal laws, that the DBE participation information submitted in the bid or within the stated time thereafter is true, correct and complete and that the information provided includes the names of all DBE firms that will participate in the contract, the specific line item (s) that each DBE firm will perform, and the creditable dollar amounts of the participation of each DBE. The specific line item must reference the MoDOT line number and item number contained in the proposal. The bidder further states and certifies that the bidder has committed to use each DBE firm listed for the work shown to meet the DBE contract goal and that each DBE firm listed has clearly confirmed that the DBE firm will participate in and perform the work, with the DBE's own forces. Award of the contract will be conditioned upon meeting these and other listed requirements of 49 CFR 26.53.

(a) The bidder certifies the bidder's understanding that as the contractor on a contract funded in whole or in part by USDOT federal funds, the bidder may not unilaterally terminate, substitute for, or replace any DBE firm that was designated in the executed contract, in whole or in any part, with another DBE, any non-DBE firm or with the contractor's own forces or those of an affiliate, without the prior written consent of MoDOT. The bidder understands it must receive approval in writing from MoDOT for the termination of a DBE firm, or the substitution or replacement of a DBE before any substitute or replacement firm may begin work on the project in lieu of the DBE firm participation information listed in the executed contract,

(1) The bidder further certifies the bidder's understanding, that if a DBE firm listed in the bid or approved in the executed contract documents ceases to be

certified at any time during the performance of the contract work, and a contract or subcontract with that firm has not yet been executed by the prime and subcontractor, the contractor can not count any work performed by that firm after the date of the firm's loss of eligibility toward meeting the DBE contract goal. However, if the contractor has executed a subcontract with the firm before the DBE lost eligibility and ceased to be a certified DBE, the contractor may continue to receive credit toward the DBE contract goal for that firm's work.

(2) The bidder further certifies the bidder's understanding, that if a DBE subcontractor is terminated, or fails, refuses or is unable to complete the work on this contract for any reason, the contractor must promptly request authority to substitute or replace that firm. The request shall include written documentation that the DBE firm is unwilling or unable to perform the specified contract work. The contractor shall make good faith efforts to find another DBE subcontractor to substitute or replace the dollar amount of the work that was to have been performed by the DBE firm. The good faith efforts shall be directed at finding another DBE to perform the same, or more, dollar amount of work that the DBE firm that was terminated was to have performed under the executed contract. The substitute or replacement DBE firm may be retained to perform the same or different contract work from that which the terminated firm was to have performed. The contractor shall obtain approval from MoDOT in writing before the replacement or termination of one firm with another before the work will count toward the project DBE goal.

(3) The bidder further certifies the bidder's understanding, that the dollar value of any work completed by a DBE firm prior to approval of the DBE's substitution or replacement, in writing, by MoDOT will not be credited toward meeting the DBE contract goal. The contractor will remain subject to appropriate administrative remedies, including but not limited to, liquidated damages for the full dollar amount that the DBE contract goal is not met. Liquidated damages will also be assessed against the contractor if the original, substitute or replacement DBE firms perform the required contract work, but are not paid in full for some or all of that work by the contractor, including back charges. No credit toward the DBE goal will be given for any amount withheld from payment to the DBE or "back charged" against monies owed to the DBE, regardless of the purpose or asserted debt.

**11.0 Good Faith Effort to Secure DBE Services.** The bidder shall make a good faith effort to seek DBEs in a reasonable geographic area to where the solicitation for subcontracts and material is made. If the bidder cannot meet the goals using DBEs from that geographic area, the bidder shall, as a part of the effort to meet the goal, expand the search to a wider geographic area.

**11.1 Bidding Procedure.** The following bidding procedure shall apply to this contract, for DBE program compliance purposes.

**11.2 Contract Goal, Good Faith Efforts Specified.** As a matter of responsiveness and responsibility, the apparent low and second low bidder shall file the completed "DBE

Submittal” pages with the Local Public Agency on or before 4:00 p.m. of the third business day after the bid opening date, directly to the address specified on the “DBE Submittal” forms. No extension of time will be allowed for any reason. The means of transmittal and the risk of timely receipt of the information shall be the bidder’s responsibility.

**11.3 Bid Rejection, Bid Security Disposition.** The failure of either the apparent low bidder or the second low bidder to file the completed and executed “DBE Submittal”, listing actual, committed DBE participation equal to or greater than the specified DBE contract goal percentage, by 4:00 p.m. on the third business day after the bid opening, will be cause for rejection of that bid, and the bid surety bond or bid guaranty of that bidder will be forfeited to and become the property of the Local Public Agency upon Local Public Agency demand.

(a) Any bidder rejected for failure to submit the completed and executed “DBE Submittal” forms in the bidding documents, with full documentation of sufficient DBE participation to satisfy the DBE contract goal cannot submit a bid on the same, or substantially similar, project, when and if the project is re-advertised for bids. By submitting a bid on this federal-aid project, the bidder accepts and agrees to this provision, and the disposition of the bidders bid bond or guaranty, on behalf of the bidder and the bidders bid surety or guaranty.

(b) The surety separately acknowledges the surety to be held and firmly bound to the Local Public Agency to immediately upon demand pay to the Local Public Agency the face amount of the bid bond.

**11.4 Good Faith Efforts Described.** If the bidder cannot obtain sufficient DBE participation to meet the DBE contract goal, the bidder must list **all** good faith efforts it made to obtain the DBE participation for this contract. Good faith efforts to meet the DBE contract goal may include, but are not limited to, the following:

(a) Attending a pre-bid meeting, if any, scheduled by the department to inform DBEs of contracting and subcontracting opportunities;

(b) Advertising in general circulation trade association and socially and economically disadvantaged business directed media concerning subcontracting opportunities.

(c) Providing written notice to a reasonable number of specific DBEs so that the DBE’s interest in the contract are solicited in sufficient time to allow the firm to participate effectively;

(d) Following-up on initial written notice or solicitations of interest by contacting DBEs to determine with certainty whether the DBEs were interested.

(e) Maintaining documentation of responses received in the effort to solicit DBE participation.

(f) Selecting portions of work to be performed by DBEs to increase the likelihood of meeting the DBE goal, including, where appropriate, breaking down contracts into economically feasible units to facilitate DBE participation.

(g) Providing interested DBEs adequate information about plans, specifications and requirements of the contract.

(h) Negotiating in good faith with interested DBEs, not rejecting DBEs as unqualified without sound business reasons based on a thorough investigation of the DBE's capabilities.

(i) Making efforts to assist interested DBEs in obtaining bonding, lines of credit or insurance required by MoDOT or by the bidder.

(j) Making effective use of available disadvantaged business organizations, minority bidders' groups, local, state and federal disadvantaged business assistance offices, MoDOT and other organizations that provide assistance in the recruitment and placement of DBEs.

**11.5 Documentation, and Administrative Reconsideration of the Bidder's Good Faith Efforts.** In the "DBE Submittal" forms, the bidder has the opportunity and responsibility to provide certified written documentation as to whether the bidder made a good faith effort to meet the DBE contract goal. Any bidder that has not met the DBE contract goal must complete the "Certification of Good Faith Efforts to Obtain DBE Participation" as part of the "DBE Submittal" forms. The "DBE Submittal" forms including that certification shall be submitted to the Local Public Agency on or before 4:00 p.m. of the third business day after the bid opening date, directly to the address specified on the "DBE Submittal" forms. The complete and signed original documents shall be mailed to the Local Public Agency no later than the day of any telefax transmission. No extension of time will be allowed for any reason. The means of transmittal and the risk of timely receipt of the information shall be the bidder's responsibility. The bidder shall attach additional pages to the "DBE Submittal" forms, if necessary, in order to fully detail specific good faith efforts made to obtain certified DBE firm participation in the proposed contract work. If the apparent low bidder appears to have failed to adequately document in the "DBE Submittal" forms that the bidder made a good faith effort to achieve sufficient DBE participation in the contract work, that firm will be offered the opportunity for administrative reconsideration upon written request, before the Local Public Agency rejects that bid as non-responsive. However, regardless of the DBE contract goal participation level proposed by the bidder, or the extent of good faith efforts shown, the apparent low and second low bidders shall each file timely and separately their completed and executed "DBE Submittal" forms, or face potential sanctions and the bid bond or guaranty as specified in [Section 10.0](#) of these provisions, may become the property of the Local Public Agency subject to the Local Public Agency's demand.

**12.0 DBE Participation for Contract Goal Credit.** DBE participation on this contract will count toward meeting the DBE contract goal as follows:

(a) The applicable percentage of the total dollar value of this contract or subcontract awarded to the DBE will be counted toward meeting the DBE contract goal, only if that firm is certified by MoDOT as a DBE at the time the contract or subcontract is executed, and only for the value of the work, goods or services that are actually performed, or provided, by the DBE firm itself.

(b) When a DBE performs work as a participant in a joint venture, the contractor may count toward the DBE goal only that portion of the total dollar value of this contract equal to the distinct, clearly defined portion of the contract work that the DBE has performed with the DBE's own forces. The MoDOT External Civil Rights Administrator shall be contacted in advance regarding any joint venture involving both a DBE firm and a non-DBE firm to review and approve the contractor's organizational structure and proposed operation. When a DBE subcontracts part of the work of this contract to another firm, the value of that subcontracted work may be counted toward the DBE contract goal only if the DBE's subcontractor at a lower tier is a MoDOT certified DBE. Work that a DBE subcontracts to a non-DBE firm will not count toward the DBE contract goal. The cost of supplies and equipment a DBE subcontractor purchases or leases from the prime contractor or the prime's affiliated firms, or from another non-DBE subcontractor, will not count toward the DBE contract goal.

(c) The contractor may count expenditures to a DBE subrecipient toward the DBE contract goal only if the DBE performs a commercially useful function on that contract.

(d) A contractor may not count the participation of a DBE subcontractor toward the contractor's final compliance with the contractor's DBE contract goal obligations until the amount being counted has actually been paid to the DBE. A contractor may count 60 percent of the contractor's expenditures actually paid for material and supplies obtained from a DBE certified by MoDOT as a regular dealer, and 100 percent of such expenditures actually paid for materials and supplies obtained from a certified DBE manufacturer.

(1) A regular dealer will be defined as a firm that owns, operates, or maintains a store, warehouse or other establishment in which the material, supplies, articles or equipment required and used under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the DBE firm shall be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions will not be considered regular dealers.

(2) A DBE firm may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt, without owning, operating or maintaining a place of business where it keeps such items in stock, if the DBE both owns



and operates distribution equipment for the products it sells and provides for the contract work.. Any supplementation of a regular dealer's own distribution equipment shall be by a long-term lease agreement, and not on an *ad hoc* or contract-by-contract basis.

(3) If a DBE is a regular dealer and is used for the DBE contract goal credit, no additional credit will be given for hauling or delivery to the project site for goods or materials sold by that DBE regular dealer. Those delivery costs shall be deemed included in the price charged for the goods or materials by the regular dealer, who shall be responsible for their distribution.

(4) A manufacturer will be defined as a firm that operates or maintains a factory or establishment that produces on the premises, the material, supplies, articles or equipment required under this contract and of the general character described by the project specifications. A manufacturer will include firms that produce finished goods or products from raw or unfinished material, or that purchases and substantially alters goods and materials to make them suitable for construction use before reselling them.

(e) A contractor may count toward the DBE contract goal the following expenditures to certified DBE firms that are not "regular dealers" or "manufacturers" for DBE program purposes:

(1) The contractor may count toward the DBE contract goal the entire amount of fees or commissions charged by a certified DBE firm for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of the federal-aid contract, if the fee is reasonable and not excessive, compared with fees customarily charged for similar services.

(2) The contractor may count toward the DBE contract goal the entire amount of that portion of the construction contract that is performed by the DBE's own forces and equipment, under the DBE's supervision. This includes the cost of supplies and material ordered and paid for by the DBE for contract work, including supplies purchased or equipment leased by the DBE except supplies and equipment a DBE subcontractor purchases or leases from the prime contractor or its affiliates.

(f) A contractor may count toward the DBE contract goal 100 percent of the fees paid to a certified DBE trucker or hauler for delivery of material and supplies required on a job site, but not for the cost of those materials or supplies themselves, or for the removal or relocation of excess material from or at the job site, when the DBE certified trucking company is not also the manufacturer of or a regular dealer in those material and supplies, provided that the trucking or hauling fee is determined by MoDOT to be reasonable as compared with fees customarily charged by non-DBE firms for similar services. The certified DBE trucking firm shall also perform a commercially useful function on the project and not operate merely as a pass through for the purposes of gaining credit toward the contract DBE goal. Prior to submitting a bid, the contractor shall determine, or contact the MoDOT External Civil

Rights Administrator for assistance in determining, whether a DBE trucking firm will meet the criteria for performing a commercially useful function on the project.

(g) The contractor will receive DBE contract goal credit for the fees or commissions charged by and paid to a DBE broker who arranges or expedites sales, leases or other project work or service arrangements, provided that those fees are determined by MoDOT to be reasonable and not excessive, as compared with fees customarily charged by non-DBE firms for similar services. A broker will be defined as a person or firm that does not own or operate the delivery equipment necessary to transport materials, supplies or equipment to or from a job site; a broker typically will not purchase or pay for the material, supplies or equipment, and if the broker does purchase or pay for those items, those costs will be reimbursed in full. In most instances, the broker is merely the entity making arrangements for delivery of material, supplies, equipment, or arranging project services. To receive DBE contract goal credit, MoDOT must determine that the DBE broker has performed a commercially useful function in providing the contract work or service.

**13.0 Performing a Commercially Useful Function** No credit toward the DBE contract goal will be allowed for contract payments or expenditures to a DBE firm, if that DBE firm does not perform a commercially useful function on that contract. A DBE performs a commercially useful function when the DBE is solely responsible for execution of a distinct element of the contract work, and the DBE actually performs, manages and supervises the work involved with the firm's own forces. To perform a commercially useful function, the DBE alone shall be responsible, and alone must bear the risk, for the material and supplies used on this contract, selecting a supplier or dealer from those available, negotiating price, determining quality and quantity, ordering the material and supplies, installing those materials with the DBE's own forces and equipment and paying for those materials and supplies. The amount the DBE firm is to be paid under this contract shall commensurate with the work the DBE actually performs and the DBE credit claimed for the DBE's performance.

**13.1 Contractor's Obligation to Monitor Commercially Useful Function Performance.** It shall be solely the contractor's responsibility to ensure that all DBE firms perform a commercially useful function. Further, the contractor is responsible to, and shall ensure that each DBE firm fully performs the DBE's designated tasks, with the DBE's own forces and equipment, under the DBE's own direct supervision and management. MoDOT is under no obligation to warn the contractor that a DBE's participation may not count toward the goal, other than through official notification with an opportunity for administrative reconsideration at the conclusion of the contract work.

**13.2 DBEs Must Perform a Useful and Necessary Role in Contract Completion.** A DBE does not perform a commercially useful function if the DBE's role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.

**13.3 DBEs Must Perform The Contract Work With Their Own Workforces.** If a DBE does not perform and exercise responsibility for at least 30 percent of the total cost of the DBE's contract with the DBE's own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, MoDOT will presume that the DBE is not performing a commercially useful function.

**13.4 Factors Used to Determine if a DBE Trucking Firm is Performing a Commercially Useful Function.** The following factors will be used to determine whether a DBE trucking company is performing a commercially useful function :

(a) To perform a commercially useful function, the DBE trucking firm shall be completely responsible for the management and supervision of the entire trucking operation that the DBE is being paid for on the contract work. There shall not be contrived arrangement, including but not limited to, any arrangement that would not customarily exist under regular construction project subcontracting practices for the purpose of meeting the DBE contract goal.

(b) The DBE must own and operate at least one fully licensed, insured and operational truck used in performance of the contract work. This does not include a supervisor's pickup truck or a similar vehicle that is not suitable for hauling the necessary materials or supplies.

(c) The DBE receives 100 percent contract goal credit for the total reasonable amount the DBE is paid for the transportation services provided on this contract using trucks the DBE owns, insures and operates, using drivers that the DBE employs.

(d) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE firm that leases trucks from another DBE will receive credit for the total fair market value actually paid for of the transportation services the lessee DBE firm provides on the contract.

(e) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. However, the DBE who leases trucks from a non-DBE is entitled to DBE contract goal credit only for the brokerage fee or commission the DBE receives as a result of the lease arrangement. The DBE will not receive credit for the total value of the transportation services provided by the non-DBE lessee. Furthermore, no DBE contract goal credit will be allowed, even for brokerage fees or commissions, where the DBE leases the trucks from the prime contractor on the project or a firm owned, controlled by, or affiliated by ownership or control to, the prime contractor.

(f) For purposes of this section, the lease shall indicate that the DBE firm leasing the truck has exclusive use of and control over the truck. This will not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, provided the lease gives the DBE absolute priority for and control over the use of the

leased truck. Leased trucks shall display the name and identification number of the DBE firm that has leased the truck at all times during the life of that lease.

**13.5 MoDOT Makes Final Determination On Whether a Commercially Useful Function Is Performed.** MoDOT and the Local Public Agency will have the final authority to determine whether a DBE firm has performed a commercially useful function on a federal-aid contract. To determine whether a DBE is performing or has performed a commercially useful function, MoDOT will evaluate the amount of work subcontracted by that DBE firm or performed by other firms, and the other firms forces and equipment. Any DBE work performed by the contractor, or by employees or equipment of the contractor will be subject to disallowance under the DBE Program, unless independent validity and need is demonstrated.

#### **14.0 Verification of DBE Participation, Liquidated Damages.**

**14.1** Prior to final payment by the Local Public Agency, the contractor shall file with the Local Public Agency a detailed list showing each DBE used on the contract work, and the work performed by each DBE. The list shall show the actual dollar amount paid to each DBE for the creditable work on this contract, less any rebates, kickbacks, deductions, withholdings or other repayments made. The list shall be certified under penalty of perjury, or other law, to be accurate and complete. MoDOT and the Local Public Agency will use this certification and other information available to determine if the contractor and the contractor's DBEs satisfied the DBE contract goal percentage specified in this contract and the extent to which the DBEs were fully paid for that work. The contractor shall acknowledge, by the act of filing the detailed list, that the information is supplied to obtain payment regarding a federal participation contract.

**14.2** Failure on the part of the contractor to achieve the DBE participation to which the contractor committed in this contract may result in liquidated damages being imposed on the contractor by the Local Public Agency for breach of contract and for non-compliance. If this contract was awarded with less than the original DBE contract goal proposed by the Local Public Agency, the revised lower amount shall become the final DBE contract goal, and that goal will be used to determine any liquidated damages to be assessed. Additionally, the Local Public Agency or MoDOT may impose any other administrative sanctions or remedies available at law or provided by this contract in the event of breach by the contractor by failing to satisfy the contractor's DBE contract goal commitment. However, no liquidated damages will be assessed, and no other administrative sanctions or remedies will be imposed when, for reasons beyond the control of the contractor and despite the good faith efforts made by the contractor, the final DBE contract goal participation percentage was not achieved. The contractor will be offered the opportunity for administrative reconsideration of any assessment of liquidated damages, upon written request. The administrative reconsideration officer may consider all facts presented, including the legitimacy or business reason for back charges assessed against a DBE firm, in determining the final amount of liquidated damages.

**15.0 Prompt Payment Requirements.** In accordance with Title 49 CFR 26.29, the contractor shall comply with the prompt payment requirements of that regulation, Section 34.057, RSMo., the provisions of the MoDOT's rule 7 CSR 10-8.111 and this contract. By bidding on this federal-aid contract, and by accepting and executing that contract, the contractor agrees to assume these contractual obligations, and to bind the contractor's subrecipients contractually to those prompt payment requirements at the contractor's expense.

**16.0 Miscellaneous DBE Program Requirements.** In accordance with Title 49 CFR Part 26 and the MoDOT's DBE Program rules in Title 7 CSR Division 10, Chapter 8, the contractor, for both the contractor and for the contractor's subcontractors and suppliers, whether DBE firms or not, shall commit to comply fully with the auditing, record keeping, confidentiality, cooperation and anti-intimidation or retaliation provisions contained in those federal and state DBE Program regulations. By bidding on this federal-aid contract, and by accepting and executing that contract, the contractor agrees to assume these contractual obligations, and to bind the contractor's subrecipients contractually, at the contractor's expense.